No. 80-624

DEC 28

MICHAEL RODAK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

SHIRLEY M. HUFSTEDLER, Secretary of the Department of Education, et al.,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, et al.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALLEN G. SCHWARTZ
Corporation Counsel
Attorney for Respondents
100 Church Street
New York, New York 10007
(212) 566-2192

JOSEPH F. BRUNO,
GREGG M. MASHBERG,
of Counsel.

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Question Presented

Whether the Court of Appeals for the Second Circuit was correct in holding that a school district is entitled to a waiver of ineligibility under the

Emergency School Aid Act of 1972, where the "practice policy or procedure" which resulted in the ineligibiity determination "has ceased to exist or occur," and the school district is in the process of implementing a phased plan to eradicate the effects of such policies.

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STATEMENT

This is the second case to reach this Court concerning the dispute between the New York City Board of Education ("the Board") and the United States Department of Health, Education and Welfare ("HEW") over the Board's entitlement to funding under the Emergency School Aid Act of 1972 ("ESAA"), 20 U.S.C. §§1601 et seq.[1/] In the first case, Board of Education of the City School District of the City of New York v. Harris, 444 U.S. 130 (1979), this Court resolved the question of the

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1/ ESAA was simultaneously repealed and reenacted effective September 30, 1979, pursuant to the Education Amendments of 1978. Pub. L. No. 95-561, 92 Stat. 2268 (sec. 601 (b)(2)). It was recodified at 20 U.S.C. §§3191 et seq. and remains identical in pertinent part to the former version which governs this case.

Responsibility for the administration of ESAA has been transfered from HEW to the new Department of Education. See, Pet. at 2, n.2.

proper test for determining when an ESAA applicant should be found ineligible for funding due to alleged discriminatory staff assignment policies. 20 U.S.C. §1605(d)(1)(B). It was held that a rebuttable disparate impact test is applicable to this particular ground of ineligibility and that under this test the Board was ineligible for 1977-1978 ESSA funding.

Harris did not consider the distinct question of a school district's entitlement to a waiver of ineligibility as an alternative means of funding where it had been found ineligible for a grant in the first instance. Under Section 1605(d)(1) of ESAA, where an applicant has been found ineligible for funding it may yet obtain a grant by means of a waiver of ineligibility. Waivers are available where the applicant provides assurances that:

> ...[A]ny practice, policy or procedure, or other activity resulting in the ineligibility has ceased to exist or occur and include such provisions as are necessary to insure that such activities do not reoccur after the submission.

20 U.S.C. §1605(d)(1).

The issue on which petitioners seek review by this Court is whether the court of appeals correctly construed this provision.

On June 20, 1978, the Secretary of HEW informed the Board that it was ineligible for a 1978-1979 ESAA grant because of the same allegedly discriminatory staff assignment practices which had resulted in the ineligibility finding for 1977-1978 funds. At issue for 1978-1979 was $2.36 million. On July 7, 1978, the Board applied for a waiver of ineligibility for 1978-1979 ESAA funding. The application was denied on September 26, 1978, on the grounds, inter alia, that the 1977 Memorandum of Understanding

("MOU") between the Board and the HEW Office of Civil Rights was a phased remedial plan and would not eradicate the disparity in teacher assignments by the opening of the 1978-1979 school year.[2/] See, Pet. App. at 31a, n.5.

Shortly thereafter, the Board initiated this action challenging the finding of ineligibility and the denial of its application for a waiver of ineligibility. The district court upheld the ineligibility finding but entered an injunction remanding the Board's waiver application for de novo reconsideration. The court held that where a waiver applicant has entered into a

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2/ A petition for a writ of certiorari has been filed with this Court in Caulfield v. The Board of Education, No. ____ (filed December 15, 1980), Docket No. 79-6191 (2d Cir. Sept. 22, 1980), aff'g 486 F. Supp. 862 (E.D.N.Y. 1979). Caulfield presents a challenge to the validity of the MOU. See, Pet. at 5, n.4.

remedial plan with HEW and all "active discriminat[ion]" has been terminated (Pet. App. at 56a), and the effects of prior discriminatory policies will be eliminated over the course of the plan's implementation, a waiver of ineligibility may be available. The court granted the Board's motion for summary judgment remanding its waiver application to the agency for a determination of whether the MOU was being properly implemented. In the process, the court voided 45 C.F.R. §185.44(d)(3) of the ESAA regulations, to the extent that it conflicted with the court's opinion.

The court of appeals affirmed with Judge Oakes dissenting. The majority held, per Judge Meskill, that once a waiver applicant had "adopted a policy of eliminating discrimination in a manner approved by HEW" a waiver should not be withheld simply because the

applicant "must tolerate segregative teacher assignments until the plan is fully implemented...." Pet. App. at 17a.

Shortly after the decision below was rendered, this Court's opinion in Harris was handed down. Petitioners filed a petition for rehearing with a suggestion for a rehearing en banc on the basis that, inter alia, the court of appeals' decision was inconsistent with Harris. The petition was denied with Judge Oakes adhereing to his previous view. Judge Meskill held on rehearing that the issue before this Court in Harris -- intent vs. impact as the test for determining ineligibility -- was not controlling on the separate question of the availability of waiver of ineligibility, and that the decision

below was fully compatible with Harris.[3/]

REASONS FOR NOT GRANTING THE PETITION

In seeking review of the Second Circuit's decision in this matter, petitioners rely on essentially four grounds: (1) the decision below is inconsistent with ESAA's legislative history -- most notably the history surrounding ESAA's predecessor, the Emergency School Assistance Program ("ESAP"), Pub L. No. 91-380, 84 Stat. 800, 803-804; (2) the decision below is inconsistent with this Court's decision in Harris; (3) the decision below is inconsistent with the legislative history surrounding the 1978 reenactment of ESAA; and (4) the decision below and

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3/ Pursuant to the decisions below, the $2.36 million fund earmarked for the Board's 1978-1979 ESAA application remains intact pending final judicial or administrative review.

that of the District of Columbia Court of Appeals in Kelsey v. Weinberger, 498 F. 2d 701 (D.C. Cir. 1974), present a "conflict in principle" requiring resolution by this Court.

Respondents submit that none of these issues warrant review by this Court.

1. ESAP. Congress' troubled experience with ESAP, ESAA's predecessor, does nothing to support petitioners' argument that waivers of ineligibility are unavailable until the effects of past discriminatory practices have been eradicated.

In enacting ESAA, Congress' objection to ESAP focused on HEW's failure to prevent ESAP funds from going to school districts that were still actively discriminating. This is precisely the point of the report entitled The Emergency School Assistance

Program: An Evaluation (November, 1970) pp. 2-3, cited at p. 10, n. 7 of the petition. The report criticized ESAP funding of districts "engaging in serious and widespread discrimination." (Emphasis added.) See also, 117 Cong. Rec. 10758 (1971) (remarks of Sen. Mondale); S. Rep. No. 92-61 at 28 (1971) (criticising ESAP funding of agencies "practicing" illegal discrimination). Thus, the problems experienced with ESAP were not to be remedied in ESAA by requiring HEW to refuse to grant waivers of ineligibility where the effects of past discriminatory policies had yet to be eradicated. Rather, it was funding of school districts with ongoing discriminatory policies that Congress wished to prohibit in ESAA. See, Pet. App. 18a-19a. The court of appeals' construction of the waiver provision is in harmony with this legislative intent in that a

sucessful waiver applicant must have "ceased" any discriminatory policies as well as be in the process of eradicating the effects of those policies.[4/]

2. Board of Education v. Harris. The decision below is not inconsistent with this Court's decision in Board of Education v. Harris, supra.

4/ Petitioners additionally argue that the court of appeals misinterpreted ESAA's purpose as "assist[ing] local officials in shouldering the costs of the physical process of desegregation." Pet. at 12. While we agree with petitioners that ESAA's purpose is not to fund basic desegregation activities, but rather to assist in meeting "the special needs incident to" eliminating segregation (20 U.S.C. §1601(b)), we disagree that there is anything in the decision below to indicate that it was based on a faulty understanding of ESAA's purpose. The court of appeals recognized ESAA's statutory purpose and quoted it in full (Pet. App. at 4a), and subsequently concluded that ESAA does not require the elimination of "the residue of past misconduct" in order for a waiver to be granted. Pet. App. at 16a. Petitioners' claim that this result was premised on a misinterpretation of the legislative purpose is wholly unsubstantiated.

On the contrary, taken together, these decisions constitute an effective means of implementing Congress' overall intent in enacting ESAA.

In Harris, the Court held that Congress intended that applicants accused of engaging in a statutorily proscribed practice must meet a weighty burden in rebutting the accusation or else be found ineligible for a grant. That determination, when taken with petitioners' view of the waiver of ineligibility provision, would have an anomalous result. De jure segregated school districts which had been subjected to court ordered phased desegregation plans prior to ESAA's effective date, could receive ESAA grants, whereas ESAA funds would be unavailable to school districts experiencing de facto segregation, such as New York City's, while they are in the process of

voluntarily desegregating and eradicating the effects of any disqualifying condition which occurred after ESAA's effective date. [5/] Although under petitioners' reasoning a waiver could become available after the effects of the disqualifying practices are completely eradicated, the fact remains that during the intervening period -- possibly years -- no ESAA money would be available. Surely this could not have been Congress' intent, since it is obvious that the most critical need for ESAA funded programs occurs during the most intensive period of the desegregation process. Moreover, one of Congress' principal aims in enacting ESAA was to encourage voluntary desegregation efforts in de facto segregated

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5/ Both the court of appeals and the district court correctly rejected this construction of ESAA. See, Pet. App. at 20a and 55a.

districts by providing necessary financial assistance to ameliorate some of the disruptive effects of the desegregation process:

> Racial isolation of students exists throughout the country. The Committee has found a willingness on the part of many school districts to seek the elimination of this isolation through voluntary integration programs or under the court decrees. Most school districts, however, are hard pressed to meet ordinary expenses. They are in no position to incur the added expense of achieving successful integration. The committee believes that the Federal Government is under an obligation to assist these districts in their integration efforts. It is time for the rhetoric of the Federal Government to be backed up by sufficient funds to assist them in striving for this goal.
>
> * * *
>
> *** The schools are being made to bear a large part of the burden of integrating our society. The eventual attainment of that goal is seriously jeopardized so long as we deny them funds adequate to perform the task.

H. Rep. No. 92-576 at 4 (1971). See also, 20 U.S.C. §1601(b)(2); Pet. App. at 4a-6a; 52a-54a.

Thus, it is only by construing the waiver of ineligibility provision as did the court below, that Congress' overall purpose in enacting ESAA can be effectuated. Harris holds that eligibility for ESAA funding is quite restrictive, while the decision below makes clear that funding is nonetheless available where an applicant found to be ineligible agrees to immediately abandon the disqualifying practices and to eradicate existing racial disparities pursuant to a plan approved by the federal agency. In this way ESAA continues to be meaningful in providing a financial inducement for voluntary desegregation, while ensuring

that ineligible school districts are desegregating in good faith.[6/] See, Pet. App. at 20a-21a.

In asserting that the decision below conflicts with Harris, petitioners clearly overstate Harris' holding. Petitioners claim that Harris "held" that the "existence of racially identifiable faculties should preclude assistance" under ESAA and that "the existence of segregation is the dispositive factor under ESAA...." Pet. at 13. Yet Harris' language on the "existence" of segregation was strictly limited to the question of ineligibility; this Court never reached the separate question of under what circumstances ESAA assistance is available to an ineligible applicant through a waiver of ineligibility.

6/ Where an ESAA recipient fails to comply with the terms of its grant or the statute or regulations, funding will be terminated and funds not spent at the time of termination must be returned to the Government. 45 C.F.R. §185.45.

Further, petitioners engage in semantics in first quoting Harris' language that ESAA grants should not go to an applicant "maintaining a de facto segregated system" (Pet. at 13, quoting 444 U.S. at 142, emphasis in original), and then stating that "it would be exceedingly formalistic" to grant a waiver of ineligibility "during the continued maintenance of such segregation." Pet. at 13. The court of appeals in this case never held that a waiver of ineligibility is available where an applicant is "maintaining" a segregated system. Rather, the court held that where discriminatory practices had been eliminated, a waiver may be granted although the applicant "must tolerate segregative teacher assignments until the [remedial] plan is fully implemented ...." Pet. App. at 17a. "Maintaining" a segregated system is a far cry from experiencing lingering -- but diminishing

-- racial disparites while a federally approved desegregation plan is being implemented.

Petitioners are no less semantical when they argue that a disqualifying practice or policy can not cease to exist or occur until the effects of the practice or policy -- racially identifiable faculty assignments -- have been fully eradicated. Pet. at 13. As stated by the district court:

> Accepting HEW's suggestion that eliminating causes also requires elimination of all effects would blur distinctions between the concepts of cause and effect. To argue that the effects of past discrimination alone constitutes a present policy of discrimination makes little sense in the context of this case where the applicant Board has committed itself, in the Memorandum of Understanding, to a program of eliminating those effects.

Pet. App. at 51a. See also, Pet. App. at 17a.

3. The 1978 Reenactment of ESAA. Petitioners further seek review of the decision below on the ground that it conflicts with Congress' intent as manifested in the 1978 reenactment of ESAA. The Education Amendment Act of 1978, Pub. Law No. 95-561, Title VI, 92 Stat. 2252 et seq. Petitioners rely on H. Rep. No. 95-1137 at 95-96 (1978) wherein an amendment is discussed which would have the effect of explicitly overruling petitioners' construction of ESAA's waiver of ineligibility provision. Pet. at 14. The amendment was deleted by the Conference Committee without explanation. H.R. Conf. Rep. No. 95-1753 (1978).

H. Rep. No. 95-1137 does not suggest that the proposed waiver of ineligibility amendment was at odds with Congress' original intent in enacting ESAA. Rather, the Report states that

the amendment was adopted for the purpose of "making clear" to HEW that waivers are available where faculty integration efforts are still underway. Id. at 95. Thus, the proposed amendment may be viewed as clarification of the existing law rather than an unsuccessful attempt to depart from Congress' original intent.

Although it is unclear why the House's proposed amendment was not adopted, it is clear that in reenacting ESAA in 1978, the Senate shared the House's concern that ESAA funds should not be withheld from school districts engaged in the process of desegregation:

> The amendment [of the Senate Committee On Human Resources] attempts to further increase the focus on school districts in the initial stages of desegregation, making the program more accurately reflect the original congressional intent that there is a Federal responsibility to assist school districts facing emergency situations resulting from desegregation.

S. Rep. No. 95-856 at 65 (1978). Accordingly, the court of appeals' decision is not inconsistent with the 1978 reenactment ESAA.[7/]

3. Kelsey v. Weinberger. Although there is a facial conflict between the decision below and the decision in Kelsey v. Weinberger, 498 F. 2d 701 (D.C. Cir. 1974), we disagree with petitioners that this Court's review is necessary to resolve the matter.

7/ In Harris the Court commented on the rejection of this amendment in support of its conclusion that the ESAA regulations correctly predicated ineligibility on disparate impact. Id., 444 U.S. at 148. On the basis of this comment, petitioners argue that the court of appeals decision is in conflict with Harris. Petitioners' argument was considered by the court of appeals on the petition for rehearing. Pet. App. at 40a, 42a. The court concluded that this Court's reference in Harris to the unsuccessful House amendment was not addressed to the issue of waivers of ineligibility and, moreover, that its holding was consistent with Harris' construction of ESAA's objectives. Pet. App. at 42a.

Kelsey contained the broad holding that a waiver of ineligibility may be granted only where the effects of past discriminatory practices, as well as the practices themselves, had "ceased to exist." Id. at 711. Kelsey voided HEW's newly proposed regulation (38 Fed. Reg. 21646) which, ironically, was consistent with the construction of ESAA's waiver provision adopted by the courts below, and now challenged by petitioners. See, Pet. App. at 26a and n. 12; 57a-61a.

Despite Kelsey's holding, however, its facts reveal that the ESAA applicants there lacked affirmative plans approved by HEW to eliminate segregative teacher assignments. In fact, the school districts were content to resolve the "racially induced faculty assignments" simply through attrition. Id. at 706. It is thus apparent that

petitioners have overreacted to Kelsey's holding. Limited to its facts, Kelsey does nothing more than proscribe the issuance of a waiver of ineligibility where an applicant lacks a federally approved plan and does nothing more to remedy discriminatory teacher assignment policies and their effects than to rely on a future nondiscriminatory policy for filling vacancies resulting from attrition.

Viewed in this proper light, Kelsey is completely compatible with the decision below (see, Pet. App. at 23a, n. 11; 61a-66a) and review by this Court is unnecessary. Petitioners should administer ESAA so that, in accord with Kelsey, waiver of ineligibility applications are denied where school districts lack federally approved desegregation plans which will "forth-

rightly correct the effects of past discriminatory practices" (Pet. App. at 63a), while, in accord with the decision below, waivers should be granted where policies having a disparate impact have been eliminated and a federally approved plan to eradicate the condition resulting in ineligibility is being implemented in good faith.

CONCLUSION

Based on the foregoing, the question presented is inappropriate for review and the petition for a writ of certiorari should be denied.

New York, New York

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Respectfully submitted,

ALLEN G. SCHWARTZ
Corporation Counsel
Attorney for Respondents
100 Church Street
New York, New York 10007
(212) 566-2192

JOSEPH F. BRUNO,
GREGG M. MASHBERG,
of Counsel.